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BOOK REVIEWS

The Moral Decision. By Edmond Cahn. Bloomington: The Indiana University Press, 1955. Pp. lx, 342. $5.00.

The subject of this book is morality and law. At the outset Professor Cahn, who teaches law at New York University, tells us, "The purpose of this book is to draw upon the supply of moral insight and experience that American courts have gradually developed and accumulated." He gives his attention to American law, and he is concerned with it, ". . . not for its own sake but as a repository of knowledge and experience in resolving moral issues." Other writers on law and morals have looked to morals as a source of law. Cahn reverses this procedure and looks to law as a source of knowledge about morals. His interest is not in abstract moral principles to be deduced from general legal rules, but in concrete legal cases which result in moral decisions. He states in advance that in the main body of the book each topic will begin with the summary of an actual case taken from the law reports. He holds that only the concrete case, ". . . prompts the emotions, the glands, and the viscera to join with the faculty of reason in the experiences of moral evaluation." If this language is mysterious, the mystery is solved by bearing in mind that Cahn has been influenced by that variety of modern juristic thought which its adherents conceive to be realistic and which reflects the impact of the natural sciences and their emphasis on the physical and demonstrable, and he accordingly lays stress on a "sense of wrong" which is felt not only in the mind but in body reactions. Cahn goes on to say that in the concrete case the sense of wrong is informed by "genuine personal commitment," that is, morals do not exist as mental exercises, but have to do with what is to be decided.

After fifty-eight pages of discussion of various aspects of morals and law, Cahn launches his procedure of stating the gist of the facts of some particular case, and thence proceeding with a discussion of moral issues. In this fashion he takes up such topics as the value of being alive, the right to be young, grounds for divorce, property and oppression, cheating on taxes, and many others, with a concrete case preceding each discourse. The cases are real life short stories which landed in court because they raised questions courts had to decide. This method of writing the book has, from the reader's standpoint, a great merit besides the avowed one of bringing morals down to earth. Only a minority of those who read books have a taste for long continued abstract discussion of philosophical principles. Even excellent writing along such lines can

grow burdensome with accumulating weight. But as the reader proceeds with each exposition of moral principles in this book he can look forward to another real life story and what the court will decide and what this fascinating author will make of it.

Despite preliminary talk about legal decisions as repositories of knowledge in resolving moral issues, Cahn does not use his cases simply as treasure chests from which to draw out and hold up for inspection the moral wisdom of the courts. The cases are instead employed as springboards from which the author launches out into discussion of moral matters suggested by each case. Sometimes his leap carries him an imposing distance from the starting point, and it is hard to see much relation between the case with which he starts and some of the matters discussed. One thought leads to another, and the unity seems to be largely that each thought proceeded from the brilliant mind of Edmond Cahn. Otherwise put, the book is no well organized, logically erected structure of closely reasoned principles. Mark Twain's plot in "Huckleberry Finn" is simply to start his characters out on the Mississippi and float them down the stream. As they go miscellaneous events occur. It is the wit and understanding of the great writer, not the plot, which makes the superb book. Similarly it is no organized philosophical structure which makes Cahn's book superb, it is rather his deep insights into particular matters and his extraordinary ability to put them into words.

A clue to the nature of both book and author may be found in Cahn's inclusion of a section entitled "The Artist and His Works." In it Cahn writes that he cannot see how anyone can be an artist without caring to excess what others may say of his works, because only by the reactions of others can the artist find any certification ". . . that the word has become flesh, or the clay has become animated with spiritual form, or the music has snatched reverberations from the spheres." Is this Cahn, the literary artist, speaking what is in his own heart? This highly sensitive paragraph about artists took an artist to write. Cahn is a seer and a literary man who happens to have made law his field. The fact that he is impressed, sometimes unduly, with modern scientific thought of a materialistic nature does not impair such a judgment. Many artists are.

With some of Cahn's views the reviewer disagrees, notwithstanding the skill with which Cahn elaborates them. Cahn seems to regard morality as something produced by men, like their music or their literature. Of the living generation he writes, ". . . as long as they live the capacity remains with them to create moral standards superior to those their fathers evolved." Moral immutables Cahn links with authoritarianism and dismisses on the ground that there are mutations in the alleged immutables. The linking is questionable. There may be immutables

although human authority as to what they are is fallible. Knowledge of physics and chemistry varies from age to age, and advancing understanding does indeed result in discarding scientific principles believed to be immutable, but not many would contend that therefore the physical world is only what man makes of it by his physics. True there is no infallible science of physics, but there is nevertheless a physical universe which is the subject of man's science. Similarly man may and does err in what he announces as moral truth, but this is not evidence that there is no immutable moral truth to search for, nor that man makes the truths himself.

In his chapter on sexual relationships Cahn subscribes to current moral notions for which their adherents, including Cahn, claim such labels as "enlightened." He writes, "Accordingly, an enlightened moral classification—the kind we are seeking here—will not run along the traditional boundary line fixed by legal marriage, separating the permissible intercourse within the borders of wedlock from all the outside, presumedly vile types of sexual connection." Such a view, admittedly widely accepted, may be described as enlightened, but it may also be described as evidence that when man sets out to make his own morality he has little difficulty working out justification for his desires.

Cahn opens his section on grounds for divorce with a New Mexico case awarding a divorce on the ground of incompatibility to a husband who was living with another woman in adultery. This decision Cahn calls "extraordinarily wise and just," on the ground, in part, that the married persons were irreconcilable. He finds behind the older doctrine of recrimination, which denies a divorce to a guilty spouse, "Merely the fond, sentimental, and hopelessly mistaken belief that one of the parties to a divorce litigation can be genuinely innocent." Innocence being impossible, Cahn favors giving a divorce to an adulterer. It is true that few married persons are saints. But an imperfect person can still be clearly and beyond debate the wronged person, and the other can still be the marital wrongdoer. The fact that no one is innocent seems to be a poor justification for granting the adulterer his divorce. The vice of the New Mexico decision, as that decision is set forth by Cahn, is that it substitutes for the ancient command, "Go, and sin no more," the decree, "Go, and sin more freely."

On the other hand the book is replete with deep moral insights, stated and expounded with literary skill rare in juristic writing. So often does the author put basic ideas in apt language that the book, if it does not become submerged in the flood of lesser books flowing from the presses, may well become a source of future familiar quitations. Thus, "In personal relations, the only things that are valuable enough to justify compulsion will generally be destroyed if we resort to it."

And again, ". . . in being forgiven there resides a hurt which some who receive it are never able to forgive."

Cynicism plays a part in the book, and as usual adds spice, although depth of understanding rather than cynicism is typical of what Cahn has written. In bringing out the idea that men are less reluctant to cheat large impersonal entities than persons they know, Cahn writes, "What, moreover, is the history of all the armies and navies that the world ever bore but an unrelieved narrative of theft, plunder, and titanic waste?"

In another place Cahn remarks that American mores sustains cheating the government of taxes, but does not sustain statements like Cahn's that this is so. He writes that tax fraud is a usual practice in American life, but that in saying so he has violated the established mores. This is astute but probably wrong in Cahn's case. Though we normally do applaud an idealization of "the American people," we also applaud the entertaining cynic who says, "Tain't so."

The reviewer misses in Cahn's discussion of Good Samaritanism one of the most characteristic moral developments of our age—mass Good Samaritanism in which the state is the Good Samaritan and drafts many of its citizens to help play the part.[1] By social legislation we help the blind and rescue the destitute, but some of the more substantial of the rescuers, reluctant to assume the task, are compelled to do so by those in power. This is by no means the moral equivalent of voluntary good deeds done at one's own expense, but some moral progress has been made when those in power want good deeds done, though it be largely at the expense of others.

Reviews may be read for an answer to the question, "Is this really a book worth reading?" In the case of Cahn's book the answer is an unqualified, "Yes." It is not necessary to agree with Cahn on all matters in order to recognize the skill and intelligence with which he discusses them.

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Legal Control of the Press. By Frank Thayer, M.A., J.D. Brooklyn: Foundation Press, Inc. Third Edition. 1956. Pp. xv, 749.

This is the third edition of what has come to be a standard work on the law of the press since it was first published in 1944. Professor Thayer is well qualified to write on the subject because of his legal and journalistic training and experience. He is a member of the Illinois bar, and for

[1] Pound refers to the law as playing the part of "an involuntary Good Samaritan." POUND, NEW PATHS OF THE LAW 36 (1950).

many years he has been professor of journalism and lecturer on law of the press at the School of Journalism, University of Wisconsin.

The book concerns itself, as the sub-title puts it, with "those potential or actual controls that affect the press, particularly libel, privacy, contempt, copyright, regulation of advertising, and postal laws."

Many lawyers and journalists have considered it the best single text on law of the press, and the new edition certainly will help to enhance its reputation. It includes several new chapter sections, whose content matter will be described along with the general contents of the new edition. New cases and citations have been included where pertinent to bring the third edition up to date.

Thayer opens with a brief general description of legal controls on the press and the rationale of a free press in the Anglo-American tradition. "Society has granted certain rights and privileges to the press," he writes; "correlative to these rights and privileges society has imposed certain limitations or controls." These controls include administrative, punitive, and compensatory measures as a check upon possible abuses of the freedom permitted.

Because of these measures, the author points out that the newspaper publisher should have a deep appreciation of law as well as a knowledge of its application to his daily problems. Such an appreciation and knowledge will at least cause him to give due consideration to any problems that may arise and to confer with legal counsel.

The remainder of the first chapter is devoted to an overview of the historical background of Anglo-American press law, with special attention being given to such famous seditious and criminal libel cases as those of John Wilkes in England and of Peter Zenger and Harry Croswell in America. (The trial of the latter, in 1804, emphasized the developing principles that truth when published for good motives and for justifiable ends would constitute a defense, and that a jury should determine both the law and the fact in a criminal libel case.)

Another chapter continues the historical background with developments concerning the reporting of legislative bodies, newspaper licensing and censorship, laws concerning anarchy and syndicalism, taxes on the press, and "the fight against subversion." The section last named includes the material on "sedition and espionage" in the older editions, but precedes it with a discussion of enforcement of the Smith anti-subversion law (notably Dennis v. United States).

Chapters on "Freedom of the Press" and "Rights of the Press" follow. Thayer again emphasizes that the freedom is a qualified one, and then goes on to spell out the right as guaranteed in federal and state constitutions and laws as interpreted by the various courts. A pertinent change here is increased emphasis on the Fifth Amendment, under fire

from some quarters because it protects persons charged with crime (and now extended to cover "subversive" affiliation) from being witnesses against themselves. He defends the amendment and points out that it also protects the rights of the press against unlawful encroachment by the federal government—a point some newspaper editorial discussions of the amendment seem to have overlooked in recent years.

Another change is the new section on "The Threat to Reporting Spot News," a revision of the material on the Wisconsin v. Evjue (1948) case first printed in the second edition. Wisconsin law prohibits publication of the name of a rape victim, and Evjue was tried but later released for printing such information. The case did not leave the Wisconsin court system, and Thayer feels that if the equal protection of the laws provision of the Fourteenth Amendment had been stressed in an appeal to the U. S. Supreme Court, the statute might have been held unconstitutional. He points out three modern cases[1] in which state statutes limiting freedom of the press were eventually held unconstitutional by the Supreme Court. A holdover from earlier editions is the reminder that while anyone is free to publish a newspaper, there are very practical economic restrictions; and that newspaper publishing has become big business in which few people can afford to participate, thus tending to increase the danger of monopoly of opinion.

The "Rights of the Press" chapter includes familiar sections on the right to publish free from federal, state or local interference; on newspaper name protection, on property rights in news, on the rights to report and comment, on the right to postal privileges, and on the right to refuse service.

In view of Thayer's acknowledgment of the trend toward monopoly of newspaper ownership and management, his section on the right to refuse service seems anachronistic; for he points out that by weight of authority, the newspaper is not a public utility.[2] And as a result its managers may refuse to carry advertising for individuals or business, to sell newspapers to individuals or news agents, and even to publish news stories about any particular event or on any opinion.

The author discusses at length the important Associated Press case, 326 U. S. 1, 65 S. Ct. 1416 (1945), and makes it clear he is unsympathetic with the ruling that the news agency with its limited membership constituted an unlawful combination in restraint of trade within the meaning of the Sherman Anti-Trust Act. He later mentions

[1] (1) 283 U. S. 697 (1931) (concerns the famous Near v. Minnesota case); (2) Crosjean v. American Press, 297 U. S. 233 (1936); and (3) Winters v. New York, 333 U. S. 507 (1948).

[2] With the exception of Uhlman v. Sherman, 22 Ohio N. P., N. S. 225, 31 O. D. 54 (1919), which holds to the contrary. According to Thayer this case is not generally accepted as authoritative.

the Federal cases against several newspapers for alleged infringement of the same act in his chapter on "Regulation of Advertising."

Two sections of the chapter on rights of the press have been broadened in the new edition to take recent developments into account. Development of television as a competitor of the newspaper and radio is reflected in the section renamed "Broadcast Media Competition." The section formerly entitled "Access to Public Records" has been enlarged and its title changed to reflect the recent increased interest in "the struggle to maintain democratic principles against secrecy in government." This increased interest was brought about by a number of factors including the publishing of *The People's Right to Know* by Harold L. Cross in 1953; and Thayer's section now is entitled, "The Right to Know."

Importance of libel in law of the press is reflected by the fact that the next seven chapters are devoted to this complicated subject. Where there have been important developments since the second edition, these have been included; but the material is substantially the same. The chapters on libel in general, libel to property, criminal responsibility with respect to libel and obscenity, trial of the libel issue; and on the various defenses or mitigating circumstances concerning libel: justification and retraction, privilege in reporting certain types of news, and fair comment when based on a matter of public interest. Thayer manages to explain libel and the considerations surrounding it clearly without resorting to the undesirable oversimplification that some writers on law of the press resort to.

Other important controls on the press are dealt with in less detail, because they are somewhat less complex or less vital to the newspaper than libel. These are dealt with in separate chapters on privacy, contempt, copyright, and regulation of advertising.

The right of privacy provides an example of an area in which the liberties of the press often run head-on into the rights of the individual—and even more so now that radio and TV are bringing a more intimate relationship between the citizen and communication agencies. Anglo-American jurisprudence has but a "meager appreciation" of the problem of privacy, according to Thayer. He poses the problem this way:

> "The struggle for freedom of the press symbolizes clearer evaluation of human rights; when these rights over-step to the injury of human personality, there would seem need for further protection of personal existence and identity. To violate personality may be a breach of the right of liberty of the press."

Much the same approach is evident in Thayer's treatment of contempt. In discussing whether or not contempt is a "bugaboo or sub-

stantive threat," he gives both sides of the argument as it relates to justice for the individual and for society. On the one side is the necessity for the discussion of court cases; on the other side is the problem of the integrity of the courts in protecting the accused and assuring justice. A reconciliation is necessary to preserve that integrity as well as the right of the press to report and comment on legal controversies, the author rightly maintains. He argues that a solution lies mainly within the judiciary itself:

> "There would not seem great necessity for marked legislative reform in regard to constructive contempt. If the judiciary takes a common sense view, so aptly advocated by Justice Holmes, then only those threats to justice which are clear and present dangers should be held contemptuous. It is within the power of the judiciary itself to exercise discretionary control in dealing with constructive contempt problems so that there would need be little negative criticism. The judiciary can make rules for its own practice and so could easily have another judge hear the charge of out-of-court contempt presented and the answers of the person required to show cause why he should not be cited for contempt or be summarily punished."

The chapter on contempt in the last two editions, unlike in the first one, includes a most worthwhile section on "Trial by Newspaper" as well as other new sections on two recent contempt cases: the Pennekamp case, and Craig v. Harney.[3] In both cases the Supreme Court reversed contempt judgments by the state court systems, and followed broad and liberal interpretations of criminal contempt.

The chapter on "Regulation of Advertising" emphasizes the responsibilities of the press with respect to advertising—a responsibility most publishers have long recognized. Government stepped in many years ago, however, before such recognition was sufficiently widespread, and sought by regulation to protect the public from advertising fraud and chicanery in the press when it did appear or before it could appear.

The book contains four appendices, in addition to the useful table of cases and an index. Appendices include Abbreviations, Selected Bibliography, Second Class Mail Regulations, and Selected Court and Pleading Terms. The latter is especially useful to the journalism student or newspaperman with no previous training in or experience with the law of the press.

Thayer's presentation seems to represent a happy mean between that of the lawyer and that of the journalist. As the author says, too obtuse legal technicalities have been avoided but newspapermen need not hedge

[3] 331 U. S. 367 (1947); Pennekamp v. Florida, 328 U. S. 331 (1946).

on some technical terms that are really significant. Cases are handled in a meaningful way so that the reader is given significant materials and conclusions without the necessity to dig hard for them. The book does not present a digest of cases, but rather an interpretation of the general principles governing the solution of legal problems as they arise. Here the author sounds an important warning, however, when he says that there isn't a ready answer to all legal problems concerning the press; and that in numerous cases the problem has never been judicially determined. He points out that circumstances in particular cases differ; procedural rules, presentation of facts by counsel, and deliberations of juries are all factors that must be accepted as variables. The answers depend upon established rights correlated through such variables, he concludes.

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